Legal writing and legal reasoning

Babusiaux, Ulrike

THE OXFORD HANDBOOK OF

ROMAN LAW AND SOCIETY

Edited by

PAUL J. DU PLESSIS

CLIFFORD ANDO

and

KAIUS TUORI

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

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It furthers the University's objective of excellence in research, scholarship,
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Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2016933500

ISBN 978–0–19–872868–9

Printed in Great Britain by
Clays Ltd, St Ives plc

CHAPTER 14

LEGAL WRITING AND LEGAL REASONING

ULRIKE BABUSIAUX

14.1 INTRODUCTION

THE seminal influence of Roman law on posterity may be explained by the survival of a true specialist literature on law, which contains legal discourse, mainly from writings of the so-called "classical jurists" during the first to third centuries AD.[1] The transmission of these writings is due to Justinian's compilation of ancient legal sources in the sixth century AD, which is said to have preserved about 5 per cent of the existing legal literature.[2] Simultaneously, it changed the character of the texts recorded, since Justinian's compilers only collected those parts that were suitable for compilation.[3] This focus explains why they cast aside most of the literary elements, such as dedications, introductions and other information on content and style of the work.[4] Hence, in the Digest, classical Roman law is available today as a corpus of legal statements structured according to the needs and the preconceptions of Byzantine legal scholars and practitioners. This normative understanding of these texts prevailed throughout the Middle Ages until the age of codifications and is still tangible in the dogmatic research on Roman law. Yet, the fragments preserved in the Digest can be and also have been read as information on the excerpted jurists, their intellectual individuality, their different legal methods and their style.[5]

The framing of different text-types is one of the achievements linked with the name of Fritz Schulz. In his still very influential study of "Roman legal science" (1946) he

[1] On the "classical period" of Roman law see Schulz 1946, 99–101; Wieacker 1988, 19–25.

[2] C. *Tanta* (a. 533) §1. [3] On Justinian's work see Wieacker 2006, 287–324.

[4] Little has survived, e.g. the famous introduction to Gaius' commentary on the XII Tables in D.1.2.1 (Gaius, XII Tables, book 1): "Since I am aiming to give an interpretation of the ancient laws, I have concluded ... This is not because I like making excessively wordy commentaries, but because I can see that in every subject a perfect job is one whose parts hang together properly. And to be sure the most important part of anything is its beginning" (transl. ed. Watson), on this see Harris 2014, 71–72.

[5] For an overview see Santucci 2012, 150–157.

showed the Roman jurists as experts in the Weberian sense and distinguished isagogical literature, commentaries and so-called *problemata*.[6] Some of Schulz's presuppositions have been challenged by further research; Detlef Liebs' numerous works in particular have deepened the understanding of Roman legal literature. Liebs' contributions to the *Handbuch der lateinischen Literatur der Antike* present Roman legal writing within the context of the remaining Roman literature and give a detailed account of every single work of legal writing that has been transmitted by Justinian compilation.[7] Moreover, Liebs has shown that jurists unattested in the literature were nevertheless important in the legal life of Rome and stressed the distinctiveness of Roman legal writing in comparison to these jurists.[8] Another improvement fostered by Liebs' research is the acknowledgement of jurists from the Roman provinces, especially the Greek-speaking East, explaining that they drew on their cultural background also when practising the most Roman of all disciplines, namely law.[9]

One aspect that still needs further research is the analysis of the literary character (*Literarizität*) of Roman legal writing. This aspect is strongly linked to the examination of the methods employed by the Roman jurists in their works. Therefore, the present study will neither describe single works of Roman legal literature nor treat singular arguments or the weight of different arguments within legal writing and legal reasoning. In lieu thereof the internal structures of legal writing will be examined by means of a narrative analysis. The advantage of this approach lies in the fact that a narrative analysis

> does not focus on norms, foundational principles, or the policies enacted by the law, but rather attends to its narrative dimension—characters and events, how they are described, which textual and rhetorical elements serve to elaborate their content, and the communicative processes through which the lawgiver transmits the law to its audience.[10]

The narrative reading focuses on the cases ("stories") the jurists are telling, the verbal presentation of these cases and the "discourse" by which the messages are conveyed to the reader. It must be stressed that this approach is not anachronistic since the basic idea of narrative analysis was already known to the Greek philosophers, who distinguish between literature (*mimesis*) and philosophy (*logos*) and stress their coincidence in philosophical treatises.[11] Moreover, it seems that modern narrative analysis owes a great deal to ancient rhetoric, since the basic narrative structure, the story or the case, is inspired, if not taken over from the rhetorical concept of *narratio*.[12] Even if it cannot be assumed that Roman legal writing is infused with rhetorical knowledge throughout, it is evident that Roman jurists, as part of the elite, were trained in essential rhetorical techniques and therefore also used their fundamental rhetorical skills as a basis in their legal writing.[13]

[6] Schulz 1946, 141–261.

[7] See Liebs 1989, 1990, 1997 and 2002. See also the regular updates on: http://www2.jura.uni-freiburg.de/institute/rgeschi/handbuch_liebs.php, accessed 28 January 2016.

[8] Further bibliography in Liebs 2002, 560–562.

[9] Fundamental is Liebs 1976, 322–345; an overview can be found in Liebs 1997, 209–217 with further bibliography.

[10] Bartor 2012, 292–311, 293.

[11] Neschke-Hentschke 2013, 144–145.

[12] On *narratio* see Knape 2003, 98–104. On the rhetorical influence on modern narrative analysis see Deciu Ritivoi and Graff 2008, 955–957.

[13] On this see Kacprzak, ch. 16.

The programme sketched thus far necessitates a focus on writings that can be directly analysed and compared. This implies the exclusion of Republican jurists, since very little direct evidence about them has been preserved. Nor will any consideration be given to legal writing of later ages, especially that of Justinian, Byzantine and medieval study of the Roman sources. This later literature has its own problems, as well as its specific structure and style. This caveat also holds true for the so-called "epi-classical" legal writing during the period from Diocletian to Justinian: even though the legal standards are said to have been preserved within the Imperial chancellery, there is little evidence for proper legal literature, apart from isagogic writing.[14]

14.2 Different Degrees of Narrative Concentration

The first and very simple distinction that can be made when looking at Roman legal writing is the one between casuistic and non-casuistic or systematic texts. From the point of view of narrative analysis, relating a case is telling a story. But it is also obvious that cases may be more or less integrated into other structures, such as systematic presentation or argumentation. Therefore, different degrees of narrative concentration can be observed within the different types of legal writing.

Although Roman law is said to be casuistic in nature, the jurists' writings do not merely pile up cases. A very strong casuistic and therefore also narrative coinage can be observed in the "Collections of replies" (*libri responsorum)* and the "Digests" (*libri digestorum),* but also in the epistolary literature (*libri epistularum*) and in works written for the instruction of advanced students, such as writings entitled "Considerations" (*libri quaestionum)* and "Disputations" (*libri disputationum*).[15] From this point of view, the narrative analysis coincides with the literary genre of "problematic literature" coined by Schulz. But in contrast to Schulz, the narrative analysis also considers the unique work *Imperialium sententiarum in cognitionibus prolatarum ex libris sex, Decretorum libri tres* by Paul as a work of casuistic structure.[16] In this text, Paul delivers protocols of sessions before the Imperial court and gives a report of the factual background of the trial and the arguments of both sides before relating the emperor's decision (*decretum*).[17] A more indirect use of cases can be observed within the books on "rules" (*libri regularum*). In these writings the jurists try to summarise and to generalise rules by way of induction from cases.[18]

Clearly not of casuistic character are the isagogical writings[19], especially the "Small handbook" (*Liber singularis enchiridii*) written by Pomponius and the *Institutiones* by

[14] For a recent survey see Babusiaux 2015, 261–265.

[15] On different types of casuistic literature see Liebs 1997, 99–101; on *libri responsorum* and *epistulae* see Liebs 1990; on *libri quaestionum* see Babusiaux 2011, 16–18, 266–269.

[16] On this work (*libri decretorum*) see Liebs 1997, 172.

[17] Very well known is the case of Camelia Pia reported in Pal. 877 = D.37.14.24 Paul., Imperial Decisions Pronounced in Judicial Examinations on Decrees, and in Pal. 59 = D.10.2.41 Paul., Decrees, book 1, on which Peachin 1994; Wankerl 2009, 194–202.

[18] On this see Schmidlin 1976; Nörr 1972, 28–32.

[19] On isagogical writings see Liebs 1997, 187–188.

Gaius. Paul, Ulpian, Modestinus and Marcian have also written works with that title. Even if the *Institutiones* mention rescripts or replies, the corresponding cases are not narrated; the jurists only give the results obtained and try to integrate these results in their description of the existing law.[20] A more systematic approach is also found in the monographs and the commentaries on statutes.[21]

An intermediate position with a mixture of casuistic or narrative elements and a more systematic approach can be seen within the edictal commentaries (*libri ad edictum*), the commentaries on earlier jurists, the instructive works for magistrates, and in books that define themselves as *collectanea* or *epitomes* of other works.[22] Their intermediate position stems from the fact that they contain narratives of cases, but that these cases are tied back into a more systematic starting point (edictal commentaries, monographs) or integrated into a more general discussion of a legal problem (*libri ad Sabinum, notae*, instructive works). A typical example of such mixing, while coming from a systematic starting point, can be found in Ulpian's edictal commentary on *negotiorum gestio*. The passage starts with a citation of the edictal wording ("the praetor says"), which first leads to a comment on the significance of the central words of the edict and then to the presentation of different cases to which the edict applies.[23] The commentary then turns back to some central wording of the edict that the jurist defines by giving first a semasiological and then an onomasiological explication.[24] As this procedure aims at defining the application of the edict from the side of the facts, the onomasiological view is closely connected to the presentation of cases, which may be real, taken out of existing legal writing or even invented.[25]

An illustration of a general legal discussion can be coaxed out of Ulpian's argument on the sale of wine in his *Libri ad Sabinum*: The argument begins with a phrase that might be a citation of Sabinus:

> If wine which has been sold goes sour or goes off in some other way, the loss is the purchaser's, as it would be if the wine were spilled, whether through the casks being staved or for some other reason. (Transl. ed. Watson)

Ulpian then gives exceptions to this rule and cites cases, in which the vendor has to bear the risk, especially when the parties agreed upon a degustation period or had foreseen a case of *custodia*.[26] The origin of these exceptions may be called casuistic, as they can be traced back to the contractual conditions developed in contractual practice (*Kautelarpraxis*), but the jurist is systematising these exceptions under the main idea of risk allocation in a contract of sale (*periculum*).

[20] An example would be Inst.Gai.2.119–120 on the so-called pretorian testament, where Gaius cites a rescript by Antoninus Pius that prefers the pretorian heir over the civil-law heir. The best overview on the legal question is Müller-Eiselt 1982, 170–175.

[21] On the monographs see Liebs 1997, 127–128; on the commentaries on statutes see Wesel 1967, 133–137.

[22] On commentaries (*libri ad*) see Liebs 1997, 139–140; on the instructive works for magistrates see dell'Oro 1960.

[23] Pal. 347 = D.3.5.3pr.-5 Ulp., Edict, book 10.

[24] See Pal. 349 = D.3.5.3.6–11 Ulp., Edict, book 10; Pal. 350 = D.3.5.5.2 Ulp., Edict, book 10.

[25] Further details on this technique can be found in Babusiaux 2014, 34–46.

[26] Pal. 2717 = D.18.6.1pr Ulp., Sabinus, book 28, on which see Jakab, 2009,187–258.

It must be stressed that the characterisations mentioned are only approximations and that jurists felt free to define the scope of their writings differently even if they adopted the same title as another jurist. One obvious example can be taken from a comparison between two books entitled "Considerations" (*Quaestiones*), but written by two different authors, Paul and Papinian: whereas Paul pays great attention to all individual traits of the case reported, Papinian mainly uses cases in an argumentative fashion, constructing them around a larger theoretical argument.[27] Thus, Paul seems to focus on the narrative, while Papinian seems to focus on systematic questions. With regard to their respective literary genre, Paul's *Quaestiones* appear to be close to the *Libri responsorum*, with the slight difference that Paul's report of the facts is more extensive than in most *libri responsorum*. On the other hand, Papinian's *Quaestiones* are close to writings entitled "Disputations" (*disputationes*), i.e. works that even present virtual cases to develop and strengthen an argument.[28] In that respect, *disputationes* can be interpreted as insights into the process of law-finding, whereas *responsa* are the results of this process.

The differences observed in the use of narrative structures go hand in hand with divergences in the verbal representation of the cases cited by the jurists in their writings.

14.3 The Verbal Representation of the Story

Looking at the different types of casuistic literature, one can easily distinguish between different types of storytelling. The first main distinction is linked to the presentation of the case. The jurist can indeed give names, places and further details enabling the reader to identify the persons involved;[29] but in most legal works the cases will be cited without these indications, i.e. by using stock names ("Blankettname"), such as "Titius", "Maevius" and "Seius" for free men and "Stichus" and "Pamphilus" for slaves.[30] This distinction is not only linked to the differences between more or less casuistic materials in one work. That is to say that individual naming can also be found in a work like Papinian's *Quaestiones* where cases are used as arguments, whereas anonymous citing is quite often used in strictly casuistic writing such as *libri responsorum* or *digesta*.[31] This amalgamation shows that it depends upon the jurist's or his editor's[32] choices as to whether individual features

[27] For a further characterisation of Paul's work see Schmidt-Ott 1993, 58–101.

[28] On the character of *disputationes* see Lovato 2003, 3–15.

[29] A very special example is D.39.5.27 Pap., Considerations, book 29: "A young man called Aquilius Regulus wrote to the rhetor Nicostratus as follows: ..." (transl. ed. Watson), on which see Babusiaux 2011, 247–249.

[30] An overview on the material can be found in Meinhart 1986, 186–197. See also ch. 12 by Harries in this volume.

[31] One can also find traces of depersonalisation before publication, e.g. Pal. 19 = D.14.3.20 Scaev., Digest, book 5: "Lucius Titius appointed a freedman to manage a moneylending business of his. The freedman issued the following *cautio* to Gaius Seius: 'Greetings to Domitius Felix from Octavius Terminalis, acting for Octavius Felix.'" (transl. ed. Watson). On the legal issues see Platschek 2013, 214–221.

[32] The edition and transmission of legal writing before Justinian constitutes a separate problem that cannot be dealt with here. See Wieacker 1975, 72–138.

of the cases are communicated or not. The use of prominent names may serve to intensify the argument, since they prove that a case really happened or that important people were involved and given some advice by the citing jurist, but it may also be that the individual features were left in the *libri responsorum* or *digesta* because the collection was edited negligently. This negligence or lack of ability could be connected with the arcane character of a work, i.e. that it was originally intended only for a restricted circle of followers of the jurist.[33]

The second and even more important distinction with regard to the verbal presentation is associated with the use of the case by the citing jurist. The author may be interested in presenting and commenting on the case, so that the case itself is the main concern of the text. But it can also be observed that cases are cited as proof, as examples (*exempla*), whose solution is widely accepted but needed in another controversial case.[34] Yet the case may also be cited or invented in order to prove the failure of another jurist; in this case, the narrative structure is a special form of *reductio ad absurdum* or part of a dialectic or topical argumentation.[35]

These features are connected with the last and most important criterion of distinction, namely the existence or use of dialogue structures within legal writing. Dialogue is the basic model for all writing in Antiquity, especially in teaching and technical argumentation.[36] Its importance in legal writing stems from the generally accepted influence of dialectics on the jurists' reasoning. At its core, dialectical reasoning consists in a dialogue between a defendant, trying to defend the widely accepted position (*endoxa*), and the offender, trying to prove the failure of the majority view. Proof is adduced whenever the defender has to accept the offender's assumptions, which are formulated in order to attack the majority view. In doing this, the offender will not adopt an openly converse position, but will try to relate his assumptions to the widely accepted position by means of a topical argument. If the assumptions are topically related to the *endoxa* position and are true, commonly accepted or acceptable, they weaken this position, and ultimately lead to its refutation. The same procedure can be used in an internal argument, where it is used to test the existing view and develop a better one. Narrative structures in dialectical reasoning serve as arguments; they are mainly demonstrations or exemplifications that are used as assumptions by the offender.[37]

While the dialogical structure can generally be found in writings that focus on the cases, such as *libri responsorum, digesta* and Paul's *Libri decretorum*, it can most commonly be observed in epistolary literature, commentaries on earlier jurists and the instructive writings for advanced students (*disputationes, quaestiones*). In all these writings, there is always an enquirer, which can be either a party in need of legal advice or a student. Yet, if the author attributes the role of the enquirer to an earlier jurist, he is making use of a mimetic device, since the questioning is fictitious and only serves the author's argumentation. This device is common in Paul's epitome of Labeo's "Plausible views" (*pithana*).

[33] On problems of the edition of arcane works see Liebs 2008.

[34] See Cic. *Top.* 44–45, on the text see Kacprzak, ch. 16, in this volume.

[35] On the use of *exempla* in legal writing see Nörr 2009; further examples (for topical and dialectical use of cases) in Babusiaux 2011, 63–174.

[36] See Harries, ch. 12, in this volume.

[37] See Babusiaux 2011, 63–174 with further references.

Indeed, Paul often cites Labeo's legal opinion verbatim, before phrasing his severe criticism, often introduced by "on the contrary" (*immo contra*).[38] This sequence of two opposing legal opinions can be interpreted as an imitation of a dialogue, the first speaker being Labeo, the second being Paul, posthumously criticising the first. If the author addresses students, the criticism may even be harsher: In his "Considerations" Papinian constantly replies by using rhetorical questions as answers, a stylistic device that reveals the weakness of the initial question and humiliates the enquirer. On the other hand, however, the very same jurist also uses rhetorical devices that imitate dialogues whenever he wants to justify one of his legal innovations by citing an earlier jurist.[39] Even if it is evident to the audience that the previous jurist was not defending Papinian's position, the imitation of a dialogue with the predecessor lends weight to Papinian's argument.

The importance of dialogues for instruction and persuasion explains why dialogue-structures can also be found between the author and the reader of legal writing. This external dialogue can be observed in instructive works for magistrates:

> A proconsul is not absolutely obliged to decline gifts, but he should aim for a mean, neither sulkily holding completely back nor greedily going beyond a reasonable level for gifts. (Transl. ed. Watson)[40]

Even if the jurist writing does not address the magistrate directly, but only via the third person, these writings are referring to the magistrates mentioned in the title of the work. Their target audience must have been office holders wanting to learn about their responsibilities and privileges.

Aside from the aforementioned genres, there is still a wide range of legal writing without or with only few dialogical elements. The first group of writings without dialogue structures are the commentaries on statutes and the edict; the second group consists of the isagogic works, including "Sentences" (*sententiae*), *libri regularum* and "Definitions" (*definitiones*).

14.4 Discourse: The Author's Perspective

"Discourse" as the third point of comparison in narrative analysis consists of describing the process and the methods by which the story is conveyed to the addressee. In order to trace this narrative process, it is necessary to distinguish between self-presentation of the narrative voice, as a participant in the process of finding the law and as an observer.

It is evident that the jurists are presenting themselves as participants in the legislative process whenever they collect their own replies (*responsa*) or publish their letters written to a client. This perspective is therefore inherent in the *libri responsorum*, the *digesta*, the epistolary literature, but also in the instructive works for advanced students (*quaestiones*,

[38] e.g. D.33.7.5 Labeo, Plausible Views, epitomised by Paul, book 1.

[39] See Babusiaux 2011, 249–255 (rhetorical questions), 135–137 (figures of dialogue).

[40] See Pal. 2145 = D.1.16.6.3 Ulp., Duties of a proconsul, book 1.

disputationes), in which the jurists explain how to find the law. It is remarkable, however, that this attitude is also present in the instructive works for magistrates and in Paul's *Libri decretorum*. In the case of instructive literature, an example is provided by Ulpian's book on the duties of the proconsul (*De officio proconsulis libri X*).[41] In this work, Ulpian defines the rules of conduct for the provincial governor by generalising from the rescripts he cites.[42] Since he is a valued adviser in the Imperial *consilium*, Ulpian does not hesitate to interpret the Imperial rescripts with a certain authoritative pretence. This manifestation of the authorial persona is also tangible in the reports given by Paul in his *Libri decretorum*:

> Papinianus thought that he [Clodianus' heir] had repudiated the inheritance under the earlier one [testament] but could not accept under the later one [testament]. I held that he did not repudiate in that he thought that the later one was valid. He [the emperor] decided that Clodianus had died intestate. (Transl. ed. Watson)[43]

The open expression of his dissent shows that Paul thinks of himself as a protagonist within the deliberation process at court. In fact, Paul even seems to be suggesting to his reader that his legal opinion should prevail despite the Imperial decision.[44]

Displays of the jurists' influence can also be found in legal commentaries, especially the late classical commentaries on the pretorian edict. In opposition to Schulz's description of the commentary as a mere "lemmatic" interpretation of the pretorian enactment, it must be stressed that the great commentaries written by Ulpian and Paul also prescribe how to apply the edict.[45] That is to say that in these commentaries both jurists present themselves as participants in the process of finding the law, not as mere observers of the pretorian regulation. The most telling element in this respect is the use of words of personal evaluation by Ulpian (*puto*), whenever there is a debate among earlier or contemporary jurists.[46] A comparable tendency can be observed in the commentaries on Sabinus (*libri ad Sabinum*) and similiar examinations of earlier jurists. The citation of Sabinus or other earlier jurists does not constitute a report on the existing law, but serves mainly to give a pretext for the presentation of the commentator's own voice and view.[47] A similar approach is at work in the works entitled "Rules" (*libri regularum*), in which the rules are not only reported but also challenged by the author.[48]

The jurists' participation in finding the law is even more visible in writings known as "Considerations" (*quaestiones*) and "Disputations" (*disputationes*). Since they address

[41] On this work see Liebs 1997, 181–182.

[42] Fundamental is Mantovani 1993/1994, 235–267.

[43] D.29.2.97 Paul. Decrees/Imperial Judgements, book 3.

[44] On the collections see Peachin 1994, 334–338; on Paul's critical attitude see Nörr 1974, 127–130.

[45] See Babusiaux 2014, 46–54.

[46] An example for Paul is D.41.2.1.16 Paul., Edict, book 54, where he first cites the opinion of the earlier jurists (*veteres*) and then states: "The truer view (*verius*), however, is that ..." (transl. ed. Watson).

[47] A typical example is D.28.5.4pr-2 Ulp., Sabinus, book 4, where Ulpian first cites an opinion that may go back to Sabinus, before turning to Julian's opinion and giving his own viewpoint (§1): "I think that ..." and then presenting further cases as proof of his opinion (§2): "But also if, where ..., I think ...".

[48] e.g. D.28.5.52pr. Marcian., Rules, book 3. In this example a rescript issued by Marcus Aurelius contradicts the rule established by earlier jurists. Similar are *definitiones*, see Liebs 1997, 119–120.

advanced students, the argumentative procedures that are only tacitly present in other writings are here explicitly laid out or even exaggerated for didactical reasons.[49]

On the other hand, the jurists can also adopt the position of a simple observer, as can be seen in their strictly isagogical writings, especially the *Institutiones* and Pomponius' *Liber singularis enchiridii*. This perspective can also be observed in most monographs that focus on their specific subject, rather than on arguments used in law-finding.[50] An extreme example is available in Paul's sole book on "Degrees and relationships by marriage and their names" (*De gradibus et adfinibus et nominibus eorum liber singularis*), in which the jurist simply enumerates different degrees of relationship without any visible commentary, not to mention criticism.[51] This self-effacement is also common in commentaries on statutes that describe the current state of the jurists' debate on the interpretation of a certain statute, but generally do not question the legislator's intentions.[52]

14.5 Conclusion

The narrative analysis of Roman legal writing shows the coincidence of narratives and dialogues whenever jurists present themselves as participants in the process of finding the law. Therefore, the production of law seems to be strictly connected to cases and the dialogical exchange about them.

In taking the previous observations as a basis for the description of literary genres in legal writing, some existing classifications can be corroborated, while others must be challenged. The narrative analysis presented has shown that three groups of legal writing are to be distinguished: firstly, the collections of cases (*libri responsorum*, Paul's *Quaestiones*, *digesta*, *libri decretorum*, letters); secondly, the group of examination works, commentaries on the edict and on earlier jurists as well as instructive works for magistrates. The third group consists of strictly isagogical writings, commentaries on statutes and monographs. The first group is characterised by its mainly narrative nature. A typical feature of these works is that the author as a jurist is in the centre of the work and is directly involved in the process of finding the law, which in fact consists of narrating the resolution of a concrete case. In the second group of legal writing, the narrative structure is subordinated to more systematic categories, such as the edict and the *officium* of the magistrate. The third group is characterised by the almost complete absence of casuistic elements, with

[49] A typical example for a didactical presentation of the argument can be found in D.28.5.4 Ulp., Sabinus, book 4, where Ulpian first cites a decision and then develops different solutions for alternative (and even extreme) cases. An example for an amplification is D.16.3.31pr Tryph., Disputations, book 9: "The good faith that is required in contracts calls for level dealing in the highest degree; but do we assess level dealing by reference to the law of nations [*ius gentium*] only, or, in truth, in connection with the precepts of the civil and praetorian law? Suppose ..." (transl. ed. Watson).

[50] For an overview on Paulus' monographs see Liebs 1997, 162–172.

[51] See D.38.10.10 Paul., On Degrees and Relationships by Marriage and their Names, sole book.

[52] See D.23.2.44 Paul., *lex Iulia et Papia*, book 1; see also D.37.14.17 Ulp., *lex Iulia et Papia*, book 11, in which a very controversial discussion among earlier jurists is reported, but not commented on. For the legal matters see Babusiaux 2015, 250–253.

the jurists' limiting themselves to giving an account of the current state of the law without further commentary.

When comparing these groups to the existing classifications, the principal difference lies in the further integration of late classical genres into the existing literature. The most important result is that Paul's *Libri decretorum* and the instructive works for magistrates, especially Ulpian's book "On the duties of the provincial governor", can no longer be regarded as exceptional or new types of legal literature. Instead, they appear as continuations of existing legal writing. On the one hand, Paul's protocols of Imperial decisions can be seen as a further development of the collections of *responsa* given by a jurist "in private". On the other hand, Ulpian's instructive writing for magistrates is in line with the traditional genre of edictal commentary. Just as the edictal commentary prescribes how to apply the law as a praetor or provincial governor, Ulpian's *Libri de officio proconsulis* instruct the magistrate how to behave when ruling a province.

The second major result of this enquiry lies in a subdivision of various types of writing that Schulz summarises under a common heading. The first classification to be questioned is that of "problematic literature". From a narrative point of view, *libri responsorum* and *digesta* should not to be categorised together with *quaestiones* and *disputationes*, since the first group only reports, whereas the second group actually discusses the law. Even though both are based on narrative (case) and dialogue, the first group is centred on the description of the case and its solution, whereas the second group concentrates on developing the said solution, i.e. on dialogue. Therefore the writer's intentions in his contact with the reader are of a very different nature. The same objections cast doubts on the accuracy of comprising *libri ad edictum* and *ad Sabinum* with commentaries on statutes under the common heading of "Commentaries".[53] As has been shown, the commentaries on statutes differ palpably from other commentaries (*libri ad edictum/Sabinum*), since commenting on a statute (*lex*) seems to be restricted to the interpretation of the legislator's intentions, whereas commenting on the edict or earlier jurist permits the author's interference and law-finding.

The third and last result of this study is the necessity to question a well-known characterisation of Roman law as "Jurists' law". As we have seen, even the Roman jurists themselves did not pretend to be the only participants in the law-finding process as they give space to and explicitly reference the legislator (*lex*), the emperor (*rescriptum, decretum*) and tradition (*libri ad Sabinum, mos*). Similarly, the characterisation of Roman law as *ius controversum* can also be challenged. As has been shown, the jurists treat law as a matter in constant evolution. This evolutionary character in itself presupposes a solid footing in tradition and a strict control of legal opinions by the expert colleagues. This is why the jurists are constantly trying to create consensus on legal questions,[54] and indeed, the entirety of legal literature can be understood as an attempt to achieve this consensus. The publication of *reponsa* and the public disclosure of the internal discussion of the Imperial court are meant to make the arguments public; the commentaries on the edict and on books of earlier jurists can be seen as attempts to inform about existing material and overcome its

[53] On the definition of commentaries see Schulz 1946, 183–186; Liebs 1997, 139–140.

[54] On this aspect see Giaro 2007, 197–298.

weaknesses; and last, but not least, the didactical and monographical writing serves to forge a new generation of jurists that will carry on the law.

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